

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA MARIE DIXON)	
Claimant)	
VS.)	
)	
IBP, INC.)	Docket No. 165,613
)	
Respondent)	
Self-Insured)	

ORDER

Claimant appealed the Award entered by Special Administrative Law Judge Douglas F. Martin dated June 17, 1996. The Appeals Board heard oral argument by telephone conference on December 5, 1996. Mr. Jeff K. Cooper was appointed Member Pro Tem for this case to serve in place of Appeals Board Member Gary M. Korte who recused himself from this proceeding.

APPEARANCES

The claimant appeared by and through her attorney, Diane F. Barger of Wichita, Kansas. Respondent, a self-insured, appeared by and through its attorney, Tina M. Sabag of Dakota City, Nebraska. There were no other appearances.

RECORD

The Appeals Board has reviewed the record listed in the Award. Additionally, the Special Administrative Law Judge inadvertently failed to list in the record the deposition testimony of Bud Langston dated May 22, 1995. This deposition was included in the record reviewed by the Appeals Board.

STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award.

ISSUES

The Special Administrative Law Judge denied claimant's claim for workers compensation benefits, finding claimant failed to prove she suffered an accidental injury that arose out of and in the course of her employment with respondent. Upon making that finding, the Special Administrative Law Judge did not address the other remaining issues as those issues were moot. Accordingly, this is the single issue for review by the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant claims she injured her right upper extremity and her low back while performing her regular work activities while employed by the respondent. The claimed date of accident is on or about January 31, 1992. There is some confusion, however, in the record concerning whether claimant claims her injuries occurred as a result of a specific trauma on January 31, 1992, or occurred over a period of time following that date. The record indicates the claimant's last day worked was April 29, 1992. During stipulations taken before the preliminary hearing held on April 9, 1993, claimant's attorney requested the original accident date of January 31, 1992, be amended to allege a date of accident from January 1992 through April 1992 for injuries to claimant's low back and right upper extremity. From the Appeals Board review of the record, it finds the appropriate date of accident should be the period from the initial onset on January 31, 1992, through claimant's last day worked on April 29, 1992.

The Special Administrative Law Judge found claimant's alleged injuries were not work related, reasoning claimant had failed to establish a causal connection between her work activities and her injuries. The Special Administrative Law Judge found claimant's injuries were "non-obvious" and therefore the fact finder was required to rely on medical testimony in order to find a causal connection between the alleged injuries and the employee's work activities. The Special Administrative Law Judge concluded that the testimony of P. Brent Koprivica, M.D., and John J. Wertzberger, M.D., the only two physicians to testify in this case, failed to make this required connection.

The workers compensation act is clear the claimant has the burden to prove by a preponderance of the credible evidence his or her right to an award of compensation. See K.S.A. 1991 Supp. 44-501(a) and K.S.A. 1991 Supp 44-508(g). The Special Administrative Law Judge found that claimant failed to meet this burden in regard to the threshold issue of whether claimant suffered an accidental injury that arose out of and in the course of her employment. The Appeals Board, for the reasons set forth below, disagrees with that finding.

Claimant started working for the respondent on November 12, 1991. Sometime in late December 1991 or early January 1992, she was transferred to the job of a skinner/trimmer. Claimant described this job as a fast and highly repetitious job where she had to make from one to three cuts on pieces of meat weighing from three to five pounds.

These pieces of meat were identified as pastrami pieces that moved down a conveyer belt every three to five seconds. After claimant cut the meat in pieces, she trimmed the fat and was required, depending on the lean content of the meat, to place each piece on conveyer belts located to the right, front, and below her cutting table. Claimant also had to place the trimmed fat in a bucket located to her right. The skinner/trimmer job required claimant to stand on her feet eight hours per day. Claimant described the job as requiring her to bend and twist her body at the waist numerous times while she was performing her work duties. Claimant described these work duties three different times in the record. Claimant also related essentially the same description to both Dr. Koprivica and Dr. Wertzberger in the history given by her during their examination and evaluation of her injuries.

Claimant testified her low back first became symptomatic while she was performing the skinner/trimmer job on or about January 31, 1992. Claimant also testified that her back had not bothered her before she started the skinner/trimmer job. She sought medical treatment with her family physician, Dr. Gerald W. Marcell of Lyndon, Kansas. Dr. Marcell first treated her for menstrual problems and urinary tract infection. Dr. Marcell finally ruled out those conditions because claimant's back continued to be symptomatic. The doctor ordered a CT scan which was performed on April 20, 1992, and showed bulging discs at L3-4, L4-5, and L5-S1. The CT scan indicated that a disc protrusion was also suggested on the left side at L5-S1 level. At that time, claimant reported her back problem to the respondent who sent her to the company physician, Dr. Campbell, in Emporia, Kansas. Dr. Campbell, referred claimant to Sergio Delgado, M.D., an orthopedic surgeon in Topeka, Kansas, who saw claimant once and ordered an MRI and a EMG test. Both the MRI and the EMG showed abnormalities in claimant's low back of bulging or herniated discs with L5 radiculopathy on the left.

Claimant was then referred by respondent for further evaluation and treatment to Edward J. Prostic, M.D., an orthopedic surgeon in Kansas City, Missouri. Dr. Prostic provided conservative treatment in the form of cortisone shots, physical therapy, exercises, and medication. He first saw claimant on May 29, 1992, and treated claimant until December 1992, when he released her opining she had met maximum medical improvement. During the time claimant was treated by Dr. Prostic, he released her to return to light work once in July 1992 and another time in September 1992. On both of those occasions, claimant showed up for work at the respondent's plant but before she attempted the light-duty jobs she left the plant indicating her symptoms had worsened to the point she could not attempt the light-duty work. Finally, claimant voluntarily quit her employment with respondent on the day she attempted to return to work the second time in September 1992.

The main controversy in this case, is whether claimant gave an accurate description of her job duties in her testimony and in the history she gave to Dr. Koprivica and Dr. Wertzberger, or is the accurate job description the job that is depicted in a video tape introduced into the record by the respondent. Don Franks, general foreman for respondent, testified the video tape accurately depicted the skinner/trimmer job claimant was performing in 1992. In contrast, the claimant testified the video tape did not accurately depict the job. Claimant argued the job was performed at a faster pace than shown in the video tape and

she further had to perform more bending and twisting movements than the employee who was shown in the video tape.

Dr. P. Brent Koprivica of Lenexa, Kansas, was appointed by the Administrative Law Judge to perform an independent medical examination of the claimant because the parties could not agree on permanent functional impairment. Dr. Koprivica examined the claimant on March 31, 1995. The doctor testified claimant had degenerative disc disease at multiple levels that predated her chronic low back symptoms. It was the doctor's opinion, based on the description given to him by the claimant, that claimant's work activities aggravated the preexisting degenerative disc condition resulting in claimant's symptomatic low back pain. However, the respondent had the doctor view the video tape of the employee performing claimant's skinner/trimmer job. Dr. Koprivica was then asked if the video tape was an accurate depiction of claimant's job activities, would his opinion remain that such activities permanently aggravated her low back condition. The doctor answered, "My opinion would change if that was an accurate depiction of what she was required to do precisely." Nevertheless, on cross-examination by claimant's attorney, Dr. Koprivica opined that if the job was faster than depicted in the video tape then it was his opinion claimant's injuries were work related. Additionally, Dr. Koprivica opined that if claimant was asymptomatic before she started working for respondent, her work activities would have aggravated her preexisting back condition.

At the request of claimant's attorney, claimant was examined by John J. Wertzberger, M.D., an orthopedic surgeon, located in Lawrence, Kansas. Claimant was examined by Dr. Wertzberger on February 26, 1993. Dr. Wertzberger did not review the video tape of claimant's job but testified he was familiar with claimant's job duties. The doctor testified, in fact, he was familiar with all the jobs at respondent's plant and had made job descriptions for the various jobs. He testified, "I perhaps knew more about the job than she did. . . ." Dr. Wertzberger went on to opine that claimant's work activities contributed to her low back problem.

The decision of the Special Administrative Law Judge was focused almost entirely on the opinions of the two physicians who testified in this case. The Appeals Board finds that the medical evidence is not essential to the establishment of a work-related injury or percentage of disability in a workers compensation case. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, Syl. ¶1, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Appeals Board is also cognizant of the fact that there is a conflict in the record in regard to the accuracy of the description of the job the claimant was performing at the time her back became symptomatic. Dr. Koprivica opined that if the video tape depicted precisely claimant's job duties then it would be his opinion that the job duties would not have aggravated her degenerative back condition. However, the Appeals Board finds that the record does not support a conclusion that the video tape precisely depicted claimant's job duties. Therefore, the Appeals Board finds when the whole record is taken into consideration which includes the testimony of Dr. Koprivica and Dr. Wertzberger coupled with claimant's testimony, the preponderance of the credible evidence establishes that claimant's work activities aggravated her preexisting back condition causing her to suffer a permanent low back injury. Specifically, the Appeals Board finds this conclusion is supported by the fact the

claimant was asymptomatic before she started the skinner/trimmer job, Dr. Wertzberger's opinion that claimant's job duties contributed to her back injury, and Dr. Koprivica opinions that if claimant's job description was correct and if claimant was asymptomatic before starting the job then claimant's job duties aggravated her preexisting back condition.

However, the Appeals Board finds that claimant has failed to present evidence in the record that she suffered a permanent work-related right upper extremity injury.

The Special Administrative Law Judge did not make findings in regard to any of the other outstanding issues remaining in this case. The Appeals Board, therefore, finds the Award is reversed and remanded to the Special Administrative Law Judge for findings and conclusions in regard to all the other issues in this case as they relate to the low back injury only.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Douglas F. Martin dated June 17, 1996, that denied claimant workers compensation benefits is reversed. The Award is remanded with directions that the Special Administrative Law Judge make findings on the remaining issues as they relate to the low back injury only.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Tina M. Sabag, Dakota City, NE
Douglas F. Martin, Special Administrative Law Judge
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director